

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JAMES WILLIAM TRAMMEL II,

Defendant-Appellant.

UNPUBLISHED

May 17, 2002

No. 229168

Tuscola Circuit Court

LC No. 99-007617-FH

Before: Holbrook, Jr., and Jansen and Wilder, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of two counts of third-degree criminal sexual conduct, MCL 750.520d. He was thereafter sentenced as a fourth-offense habitual offender, MCL 769.12, to concurrent terms of twenty to thirty years in prison. Defendant appeals as of right. We affirm his convictions, but remand for resentencing.

Defendant first argues that the trial court erred in admitting evidence of defendant's prior convictions. Before trial, defendant moved to exclude evidence of his prior convictions, but the trial court ruled that all but two convictions for no account checks could be admitted. At trial, defendant testified in his own behalf and admitted that he had prior convictions of two counts of false pretenses in excess of \$100, fraudulent use of building contract funds, uttering and publishing, false statements to a bank, and two convictions of nonsufficient funds checks. Defendant now contends that the prejudice of admitting these convictions outweighed their probative value.

We find that the trial court did not abuse its discretion in admitting the evidence of defendant's prior convictions because admission was proper under MRE 609(a). *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999). Defendant's prior convictions all contained an element of theft, were punishable by imprisonment for at least one year, and, contrary to defendant's argument, the probative value of the evidence outweighed any prejudicial effect. MRE 609(a)(2). Here, the convictions were all committed within less than ten years of the present offenses and are completely dissimilar from the present offenses, thereby reducing any prejudicial effect. MCL 750.131. Further, credibility was a key issue in this case. Therefore, we cannot conclude that the trial court abused its discretion in admitting evidence of defendant's prior convictions.

Defendant next argues that the trial court erred in permitting a police trooper's testimony regarding a prior consistent statement made by the victim. Defendant contends that the testimony should not have been admitted under MRE 801(d)(1)(B) because there was no charge of recent fabrication against the victim.

Here, defendant did not charge that the victim had recently fabricated his testimony. Defendant did, however, contend that the victim had an improper motive to lie, but the victim's statement to the trooper was inadmissible to rebut that charge because the victim made the statement after the motive to lie developed. *People v McCray*, 245 Mich App 631, 642; 630 NW2d 633 (2001). Additionally, the statement was not admissible to rehabilitate the victim after defense counsel impeached him with prior inconsistent statements because the prosecution did not use the same statement for the rehabilitation. *People v Sayles*, 200 Mich App 594, 595; 504 NW2d 738 (1993). Therefore, the trial court erred in admitting the testimony.

However, the error did not prejudice defendant. MRE 103(a); *Lukity, supra* at 495. Because the trooper's testimony in large part mirrored the victim's trial testimony, the improper bolstering amounted to mere cumulative evidence and did not prejudice defendant. *People v Rodriguez (On Remand)*, 216 Mich App 329, 332; 549 NW2d 359 (1996). Therefore, reversal is not required.

Defendant next claims that counsel was ineffective by failing to challenge a juror during voir dire. To establish ineffective assistance of counsel, a defendant must show that counsel's performance was below an objective standard of reasonableness and that the representation was so prejudicial to defendant that he was denied a fair trial. *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000).

An attorney's decisions regarding jury selection generally involve matters of trial strategy that we decline to evaluate with the benefit of hindsight. *People v Johnson*, 245 Mich App 243, 259; 631 NW2d 1 (2001). Additionally, although the juror expressed potential bias against defendant, the juror also stated that his decision would depend on the circumstances of a particular case and that he could set aside his opinions and follow the judge's instructions. These reassurances indicate defense counsel would not have succeeded in registering a challenge for cause against the juror. MCR 2.511(D)(3), (4). Additionally, the record does not indicate that a reasonable probability exists that the trial's outcome would have been different had this juror not been on the panel. *Johnson, supra* at 259.

Lastly, defendant asserts that the trial court erred in departing from the legislative sentencing guidelines' minimum sentence range of 50 to 200 months. In reviewing a departure from the legislative sentencing guidelines range, the existence of a particular factor is a factual determination subject to review for clear error, the determination that the factor is objective and verifiable is reviewed as a matter of law, and the determination that the factors constituted substantial and compelling reasons for departure is reviewed for an abuse of discretion. *People v Babcock*, 244 Mich App 64, 75-76; 624 NW2d 479 (2000).

A trial court may depart from the statutory guidelines if it finds a substantial and compelling reason to do so and states that reason on the record. MCL 769.34(3). The trial court may rely only on nondiscriminatory reasons and must find there are legitimate factors not considered by the guidelines or that factors considered by the guidelines have been given

inadequate or disproportionate weight. MCL 769.34(a), (b); *People v Armstrong*, 247 Mich App 423, 425; 636 NW2d 785 (2001).

A review of the sentencing transcript reveals that the trial court stated great disdain and even personal animus against defendant. The trial court also expressed dislike against the Legislature for imposing limitations on trial courts' ability to impose sentences on defendants. The trial court, however, did not specifically acknowledge or state any substantial and compelling reasons for departing from the guidelines range. See, e.g., *People v Hegwood*, 465 Mich 432, 440; 636 NW2d 127 (2001); MCL 769.34(3).

Accordingly, we remand this case for resentencing. Defendant urges us to remand to a different trial court for resentencing, claiming the trial court here demonstrated clear bias against him. We agree. The trial court expressed very strong and gratuitous comments not grounded in the record against defendant.¹ Consequently, to preserve the appearance of justice, we order that defendant be resentenced by a different trial court. *People v Pillar*, 233 Mich App 267, 270-271; 590 NW2d 622 (1998).

Defendant's convictions are affirmed. We vacate his sentences and remand for resentencing before a different trial court. Jurisdiction is not retained.

/s/ Donald E. Holbrook, Jr.

/s/ Kathleen Jansen

¹ We note that the same trial judge in this case was involved in the case in *Hegwood*, *supra*. There, our Supreme Court declined to remand for resentencing before a different trial judge, finding that the trial court's error appeared to stem from its incorrect understanding of the new sentencing requirements under the statute, but that there were not any prejudices or improper attitudes regarding the defendant. To the contrary, we find that the trial court here clearly expressed improper and prejudicial attitudes toward defendant.